

June 7, 1999

Colonel Leo W. Haseman
Director, Division of Enforcement
MN Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155-4047

RE: In the Matter of the Trespass Citation Issued to Thomas G. Sims; OAH
Docket No. 6-2000-12139-2

Dear Colonel Haseman:

An in-person hearing was held on this matter on May 18, 1999, in Adams, Minnesota. After all persons had been given an opportunity to tell their side of the story, the hearing concluded. The record closed on May 24, 1999, upon receipt of an exhibit which I requested Mr. Sims to submit.

Appearing at the hearing were Kelly Oxley, the landowner, and his son Nathan. Also appearing was Conservation Officer Kevin Prodzinski. Tom Sims, the respondent herein, and his hunting partner, Michael Dixon, also appeared.

Based upon all the facts in the record, and an application of the law to those facts, I recommend that the citation be dismissed. The essential facts are really not in dispute. There was disagreement about whether or not those facts demonstrated a violation of the law or not. This was a good faith dispute; I do not believe that there ought to be any penalty imposed for the filing of a frivolous appeal.

On November 29, 1998, Tom Sims and Mike Dixon traveled to Mower County to hunt pheasant.

They were proceeding northerly on Township Road 217 when they saw two pheasants in the east road ditch. They drove past the pheasants, then stopped. Dixon got out of the truck, entered the ditch, and began to walk to the south. Sims, who was driving the truck, turned around and drove back to where they had seen the birds. He drove past that point, then pulled over to the side of the road, got out of the truck, and loaded his gun. At this point he was standing on the road, facing north, at the point where the word "park" is written on Ex. 1. He loaded his gun, but before he could get down into the road ditch, the two pheasants got up, closer to Sims than to Dixon. They flew across the road, from east to west. Sims fired at one of them. The bird began to glide down and landed in the plowed field, quite a distance (approximately 600 or 700 feet) to the southwest of where Sims was standing. The other bird just kept flying and disappeared over the horizon. The approximate point where the wounded bird landed is marked as "Bird Drop" on Ex. 1.

The field to the left of the road is owned by Kelly Oxley, who owns 160 acres. The road runs north and south, and it provides the eastern boundary of Oxley's land. Oxley's land was not posted, but it was recently plowed, and constituted "agricultural land".

Oxley's field contains a substantial drainage ditch, which can be seen in Photos 1 and 2, as well as on the aerial photo, Ex. 1. The ditch itself, plus the grassy shoulders on either side of it, take up at least 40 or 50 feet in width. On Ex. 1, the ditch is labeled as the North Branch of the Upper Iowa River. This drainage ditch runs north and south, parallel to the road, but well out into the field, at least 700 feet to the west of the road. Then, about half way through the field, the ditch makes a 45-degree turn to the northeast, and proceeds northeasterly until it intersects the westerly road ditch of the township road. See, Exs. 1 and 2.

Dixon walked down the road ditch to where Sims was waiting, and then the two of them began walking southwesterly along the drainage ditch toward where Sims assumed the wounded bird might be found. One of them was on top of the ditch, the other closer to the bottom. They got to the point where the ditch turned south, but they did not see the bird, so they continued all the way south to an east-west road or driveway. They then turned around, and retraced their steps along the ditch, this time with both of them on top of it. They were walking north, back toward the truck parked on the township road.

As Sims and Dixon approached the bend in the ditch, a pheasant got up from the field, east of the ditch, and flew northwesterly across it. Sims shot at this pheasant, but missed it, and the pheasant disappeared over the horizon. This will be referred to below as the "second shot".

The second shot attracted the attention of Nathan Oxley, who was up by the Oxley farmstead. He saw the hunters and went over and told his father, who was working on trees around the farmstead. The two got into a pickup truck, and proceeded toward the Sims truck, which was still parked on the township road. They wrote down Sims' license plate number, and then drove further north, turned around, and proceeded south back toward the truck. Sims and Dixon, who were still walking back toward the truck, observed Oxley write down the license plate number. When they got to the edge of the road, it was at about the same time that Oxley and his son were driving past. Oxley stopped, a heated conversation ensued, and Oxley ultimately returned to his farm and called the local conservation officer, Kevin Prodzinski.

After investigating Oxley's complaint, Prodzinski ultimately issued a civil citation to Sims. Due to a number of procedural steps not important to the decision at hand, the citation was reissued in March. Sims appealed, and this hearing was held.

There are three separate bases for Prodzinski's citation. Each will be dealt with below.

1. Did Sims violate Minn. Stat. § 97B.001, subd. 2, when he first shot at the pheasant that got up from the road ditch, flew across the road, and then glided down into Oxley's field? The Administrative Law Judge does not believe that the State has

met its burden of showing that Sims did violate the statute. It is impossible to determine just where the bird was when Sims shot. In theory, if the bird was over the right-of-way of the township road, Sims could legitimately shoot at it. But if it was over Oxley's land, Sims could not shoot at it. See, *State v. Johnson*, 391 N.W.2d 1, (Minn. App. 1986). The burden to prove the location of the bird is on the State, and the record is simply not clear enough to find a violation.

2. Did Sims violate Minn. Stat. § 97B.001, subd. 2 by walking onto Oxley's land in search of the wounded bird? The Administrative Law Judge concludes that Sims did not violate the statute because of the exception in subd. 5 for retrieving wounded game. It does not matter whether Sims walked along the edge of the ditch or straight across the plowed field – the land was not posted and the exception does allow retrieval of wounded game, even for agricultural land. It is Sims' burden to show he is entitled to the exception, and he has met that burden.

3. Did Sims violate Minn. Stat. § 97B.001, subd. 2 when he shot the second time, as he was returning to his truck? Oxley asserts that Sims (and Dixon) had failed in their attempt to retrieve any wounded bird, and this second incident was nothing more than straightforward "hunting" on agricultural land without permission. Sims, on the other hand, asserts that the bird that he shot at the second time was, in fact, the wounded bird he had originally shot, and that there is nothing wrong with attempting to kill a wounded animal which is fleeing. The Administrative Law Judge finds that a reasonable person could believe that the second bird was the same bird as the one that Sims had originally shot. The location of where the first bird went down and location of where the second bird got up is so close (compare, "Bird Drop" on Ex. 1 with "Bird" on Ex. 2) that a reasonable person could assume that it was the same bird, and thus shoot at it again.

For the reasons stated above, the Administrative Law Judge recommends that the citation be dismissed. The final decision in this matter, however, must be made by the Commissioner. The Commissioner may not issue his final decision until at least five days have passed from the date of receipt of this Recommendation. During the five-day period, parties may file comments with the Commissioner regarding the recommended decision. After the Commissioner has made his final decision, he should serve a copy of it upon each party and the Administrative Law Judge by United States Mail.

Sincerely,

ALLAN W. KLEIN
Administrative Law Judge

Telephone: 612/341-7609

AWK:lr

cc: Thomas G. Sims
Conservation Officer Kevin Prodzinski
Kelly Oxley